

In its decision of 13 Oct 87 (case file No 1 ABR 10/86), the Federal Labor Court adjudicated on the extent of the works council's codetermination right in subject matter in accordance with Section 87, paragraph 1, number 2, Industrial Act. This legal regulation corresponds to Section 75, paragraph 3, number 2, GPRL. Accordingly, the decision is equally applicable to the Sending States Forces.

According to this decision, the following items are subject to the works council codetermination procedure:

- Establishment of the minimum duration of the daily working time of part-time employees.
- Establishment of maximum number of days in a week on which part-time employees may be worked.
- Establishment of the minimum number of work-free Saturdays.
- Restraint on splitting the daily working time of part-time employees.
- Linking the beginning and end of daily working time of part-time employees to the opening and closing time of the stores.
- Establishment of the duration of breathers for part-time employees.

According to this decision, without exception, the establishment of the minimum and maximum duration of the weekly working time is not subject to codetermination.

Simultaneously, the Federal Labor Court used the case to recapitulate and define its previous adjudication on the admissibility of motions for declarations on the existence or non-existence of works council codetermination rights which up to then was no easy to reconstruct:

- First of all, the Federal Labor Court confirmed in its adjudication that a motion for declaration that the conciliatory committee is not competent in certain matters is not authorized.
- On the other hand, on principle, a motion for declaration that a works council has no codetermination right in a specific matter is authorized.
- The fact that a works council makes recommendations for regulating a matter (e.g., by submitting a draft shop agreement) by itself does not yet mean that it puts forward a claim to codetermination rights with respect to the proposed regulation. The works council is not restrained from striving for regulating a matter for which it has no right of codetermination (this may even be done during the proceedings at the conciliatory committee). Accordingly, a legitimate interest to take legal action would only exist for the employer if the works council arrogated (geruehmt, d.h., unrechtmässig angeeignet) the codetermination right for a specific matter.
- However, a legitimate interest to take action on this basis which originally existed could even become void if the conciliatory committee does not render a decision on the matter in dispute, and if the works council fails to contest such a decision by the conciliatory committee.

The above precedent must be considered whenever there is disagreement between management and the works council on whether or not a specific matter is subject to the codetermination procedure. However, the decision may not be misinterpreted to mean that it is meaningless to initiate early court proceedings (Beschlussverfahren) to resolve such differences in legal opinion. It is true that it may eventually become impossible to further pursue the motion after a decision was rendered by the conciliatory committee. However, if the motion remains sufficient (zulaessig) because the conciliatory committee granted the works council the right of codetermination in dispute, the motion may be changed to an action to rescind the decision of the conciliatory committee in the “nisi prius” courts (Tatsacheninstanzen), which means that the case may be expedited.